

<b>COMPLIANCE BOARD OPINION NO. 03-8</b>
--

June 9, 2003

*Mr. Jack Jones*

The Open Meetings Compliance Board has considered your complaint alleging a violation of the Open Meetings Act by the Town of Kensington at a closed meeting on March 31, 2003. For the reasons stated below, the Compliance Board finds that the Act was not violated.

**I**

**Complaint and Response**

The complaint alleged, and the Town agreed, that the Mayor and Council of Kensington held a closed session on March 31, 2003. The issue is whether the discussion that occurred during the closed session exceeded the scope of the exception invoked to close the session.

According to the complaint, the closed session involved a discussion of an agreement between the Town and the Spring Bilingual Montessori Academy. The agreement would involve, among other things, use of the Town Park by the Academy. The complaint pointed out that the meeting was closed “to obtain legal advice related to the agreement with the school,” but the Mayor’s subsequent description of the meeting “indicated that the officials had discussed far more than legal issues and had discussed the substance of the agreement with the school, as well as new proposals made by the school that were being considered by the Town. These issues included the number of people who would be using the Town Park; the hours of such use; limitations on such use; etc. These matters involved far more than any purely legal issue and included the substance and details of the agreement with the school ....”

In a timely response on behalf of the Town of Kensington, Rachel T. McGuckian, the Town Attorney, denied that the Act had been violated. The response indicated that the meeting was closed to discuss legal issues with, and obtain advice from, the Town Attorney on a variety of matters. Specifically, three matters were identified as having been discussed during the closed session. The first, the focus of the complaint, involved a draft agreement with counsel for the Academy. During this discussion, according to the response, the Town Attorney addressed “the Town’s legal responsibilities and potential liability in allowing a gate to be installed in a park fence owned by the Town; the Town’s liability vis-a-vis the use of a Town-owned park by the school; the amount of liability insurance the

[Academy] should be asked to carry in order to protect the Town; and whether either the Town code permits or the Town could request monetary compensation from the Academy in exchange for allowing it to use the park.” In addition, a council member sought advice about the legal authority of the Mayor and the Council with respect to the agreement with the Academy, including a discussion of legal issues related to the possible permit for the use of the park. This portion of the response concluded as follows: “The discussions covered several other concerns to the Council of a legal nature, and falls [*sic*] clearly within §10-508(a)(4) and (7) permitting closed session consultations to obtain legal advice.”

Next, according to the response, the Town Attorney and Council “briefly discussed [a] request ... from a private school to have the Town issue a bond bill for their use. The discussion of this matter falls within §10-508(a)(6) and (7).”

Finally, the Council sought the Town Attorney’s advice on an issue related to a variance request of a local builder. Because of the concrete potential for litigation in this matter, the response contended that the consultation with the Town Attorney “falls within §10-508(a)(7) and (8).”

## II

### Analysis

#### A. *Scope of this Opinion*

As a preliminary matter, we observe that the complaint and response contained certain points that we shall not address in this opinion. First, apart from its allegation that the discussion in closed session of the Montessori Academy matter violated the Act, the complaint recited a variety of concerns about the merits of the possible agreement between the Town and the Academy. In this opinion, we address only the Open Meetings Act issue raised by the complaint.

Second, we shall not address issues related to the matters discussed in the closed session of March 31 other than the one identified in the complaint, concerning the Academy. Under the provisions of the Act governing complaints, we are to address whether the action of the public body identified in the complaint violated the Act. §10-502.5(b)(2) and (d)(2) of the State Government Article.<sup>1</sup> Because the complaint did not raise an issue with respect to discussion of a possible

---

<sup>1</sup> All statutory references in this opinion are to the State Government Article of the Maryland Code.

bond bill or the local builder's variance request, we shall not address those two items, albeit they were briefly treated in the Town's response.<sup>2</sup>

Finally, we note that the Town's response, in justifying the closed session with respect to the Academy, cited not only §10-508(a)(7), which authorizes a closed session in which a public body may "consult with counsel to obtain advice," but also §10-508(a)(4), which permits a closed session to "consider a matter that concerns the proposal for a business or industrial organization to locate, expand or remain in the State." There is no indication that this letter exception was cited by the Council at the time that the meeting was closed.<sup>3</sup> The Compliance Board has long taken the position that, if an exception was not cited by a public body at the time of its decision to enter closed session, the Compliance Board will not entertain a subsequent justification based on that exception. *See, e.g.,* Compliance Board Opinion 93-11 (November 30, 1993), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 53; Compliance Board Opinion 94-7 (August 16, 1994), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 96.

#### ***B. Legal Advice Exception***

There is no question that the Council was entitled to close its meeting in order to obtain the advice of the Town Attorney on the various legal issues relating to the proposed agreement with the Montessori Academy. The real issue, as it often is when this exception is invoked, is whether the closed-session discussion was limited to the obtaining of legal advice or whether it strayed into a discussion of policy choices that go beyond legal advice. A discussion of the latter is not permitted. *See, e.g.,* Compliance Board Opinion 95-11 (December 18, 1995), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 145.

The Town Attorney's response conveyed in reasonable detail the nature of the issues on which her advice was sought. All of these were properly within the scope of the exception. There is no indication of a policy-oriented discussion beyond the context of legal advice. To be sure, the Town Attorney's legal advice on such matters as the risk of liability might well have influenced how councilmembers would view the ultimate policy decisions to be made with respect to the Academy. The question, however, is whether they discussed the policy issues,

---

<sup>2</sup> It is doubtful whether, in any case, we have before us enough information to render an opinion.

<sup>3</sup> The Town has not provided us with the presiding officer's written statement required under §10-508(d)(2)(ii). The portion of the minutes that reflect the decision to go into closed session refer solely to a motion "the close the meeting ... to confer with the Town Attorney on legal issues."

as such, in the session closed to obtain legal advice. We have no basis to conclude that the line was crossed.

### **III**

#### **Conclusion**

In summary, the Open Meetings Compliance Board finds that the Town of Kensington did not violate the Open Meetings Act when it closed its meeting on March 31, 2003, to obtain advice from the Town Attorney on issues related to the Spring Bilingual Montessori Academy.

OPEN MEETINGS COMPLIANCE BOARD

*Walter Sondheim, Jr.*

*Courtney McKeldin*

*Tyler G. Webb*